STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 25, 2002
v	No. 224941 Wayne Circuit Court
DANIEL ROGALA, Defendant-Appellant.	LC No. 99-005742

Before: Zahra, P.J., and Cavanagh and White, JJ.

PER CURIAM.

Defendant was convicted by a jury, as charged, of armed robbery, MCL 750.529, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to consecutive prison terms of two years for the felony firearm conviction, and ten to twenty years for the armed robbery conviction. He appeals as of right. We affirm.

I

Defendant first argues that the trial court erred in allowing the prosecutor to impeach him with a prior conviction for attempted receiving or concealing stolen property, MCL 750.535(1); MCL 750.92. We review a trial court's decision to admit or exclude evidence for an abuse of discretion. *People v Smith*, 456 Mich 543, 549-550; 581 NW2d 654 (1998).

The admissibility of a prior conviction for impeachment purposes is governed by MRE 609. Here, defendant's prior conviction for attempted receiving or concealing stolen property involves a crime that contains an element of theft and was punishable by imprisonment for more than one year. This conviction reflects on defendant's veracity because the offense of receiving or concealing stolen property generally involves a misrepresentation relating to the right of possession of property. Additionally, the prejudicial effect of admitting the prior conviction was low because the conviction was not similar to the charged offenses, and admission of the conviction did not affect defendant's decision to testify. We agree, therefore, that the prior conviction was admissible under MRE 609(a)(2). Although the trial court did not articulate its analysis of each of the MRE 609 factors, contrary to MRE 609(b), this error was harmless because the conviction was properly admissible under MRE 609. *People v Daniels*, 192 Mich App 658, 671; 482 NW2d 176 (1991).

II

Next, defendant argues that a pretrial photographic showup was improperly conducted without the presence of counsel. We disagree. The trial court correctly ruled that, because defendant was not in custody at the time of the showup, he did not have a right to counsel. *People v Kurylczyk*, 443 Mich 289, 302; 505 NW2d 528 (1993). Additionally, we find no merit to defendant's claim that this case presented unusual circumstances requiring the appointment of counsel. See *People v Lee*, 243 Mich App 163, 182; 622 NW2d 71 (2000), and *People v McKenzie*, 205 Mich App 466, 470-473; 517 NW2d 791 (1994).

III

Defendant next argues that the evidence was insufficient to support his felony-firearm conviction. We disagree. The sufficiency of the evidence is to be evaluated by reviewing the evidence in the light most favorable to the prosecution, to determine whether a rational trier of fact could find every element of the crime proven beyond a reasonable doubt. *People v Petrella*, 424 Mich 221, 268-270; 380 NW2d 11 (1985).

Defendant correctly asserts that the statutory definition of a "firearm" specifically excludes "any smooth bore rifle or handgun designed and manufactured exclusively for propelling BB's not exceeding .177 caliber by means of spring, gas, or air." MCL 8.3t; *People v Gee*, 97 Mich App 422, 424; 296 NW2d 52 (1980). At trial, the victim testified that the man who robbed her pointed a large gun, about ten or twelve inches long, in her face. This testimony was sufficient to allow the jury to conclude that defendant possessed a firearm during the commission of a robbery. Although defendant presented evidence that he owned a BB gun[1] that was similar in appearance to the weapon used in the robbery, defendant also denied any involvement in the robbery. Viewed most favorably to the prosecution, a rational trier of fact could have found beyond a reasonable doubt that the BB gun owned by defendant was not the weapon used in the robbery. We note that the prosecutor is not obligated to "negate every reasonable theory consistent with innocence"; rather, he "need only convince the jury 'in the face of whatever contradictory evidence the defendant may provide.'" *People v Nowak*, 462 Mich 392, 400; 614 NW2d 78 (2000), quoting *People v Konrad*, 449 Mich 263, 273 n 6; 536 NW2d 517 (1995).

IV

Defendant next argues that the trial court erroneously admitted identification evidence and, consequently, there was insufficient competent evidence of identity to support his convictions. We disagree.

The record discloses that, while certain witnesses may not have had first-hand knowledge of the robbery, they did not base their identifications of defendant on inadmissible hearsay. Rather, out-of-court statements that defendant now claims were inadmissible hearsay were introduced to explain witnesses' behavior after the robbery, not for their truth. Therefore, the complained of statements were not hearsay. See MRE 801(c). Identification of the perpetrator was achieved by weaving the various witnesses' observations and actions into a coherent story

[1] No evidence was presented regarding the caliber of the BB gun.

that led to defendant. Viewed most favorably to the prosecution, the evidence was sufficient to enable a rational jury to find beyond a reasonable doubt that defendant was the person who committed the armed robbery. *Petrella, supra*.[2]

V

Defendant also argues that reversal is required because of several errors at the preliminary examination. Defendant complains that the district court erred by refusing to grant him an adjournment, by allowing identification evidence that was inadmissible hearsay, and by misstating the testimony of the complaining witness. However, because we have concluded that defendant's convictions were supported by competent evidence at trial, any errors committed at the preliminary examination were harmless. *People v Moorer*, 246 Mich App 680, 682; 635 NW2d 47 (2001).

VI

Last, defendant argues that his trial attorney was ineffective. We disagree. Because defendant failed to raise this issue in a motion for a new trial or a *Ginther*[3] hearing in the trial court, our review of this issue is limited to mistakes apparent on the record. *People v Hurst*, 205 Mich App 634, 641; 517 NW2d 858 (1994).

Whether and how to impeach witnesses is a matter of trial strategy entrusted to counsel's professional judgment. *People v Flowers*, 222 Mich App 732, 737; 565 NW2d 12 (1997). Here, defendant has failed to show that more aggressive impeachment might have made a difference in the outcome, as opposed to resulting in additional testimony favorable to the prosecution. Therefore, defendant has failed to overcome the presumption of sound trial strategy. *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995); *Flowers*, *supra*.

It is not apparent from the record that counsel failed to investigate, interview or depose the prosecutor's witnesses. Defendant has also failed to show a reasonable likelihood that counsel could have uncovered any additional information that might have made a difference in the outcome of trial. *LaVearn, supra*.

Similarly, there is no indication that the jury was confused about the layout of the scene, or about who the witnesses testified they saw at various points. In fact, the record shows that the scene was diagrammed at trial. There is no deficiency apparent on the record in this regard and, accordingly, defendant has not sustained his burden of showing that counsel was ineffective. *Hurst*, *supra*.

---

[2] We also find meritless the argument that the trial court erred in admitting the complained of statements. We note that only one of the five challenged statements was objected to below on hearsay grounds. Because the statements were admissible to explain the witnesses' actions, the court acted within its discretion in admitting the one objected to statement, *Smith, supra*, and did not commit plain error in regard to the unpreserved claims of error, *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

[3] *People v Ginther*, 390 Mich 436, 442-444; 212 NW2d 922 (1973).

At trial, one of the witnesses volunteered that he was "concerned" about what defendant might do. There was no objection to this testimony. On rebuttal, the prosecutor argued that the witness was afraid of defendant. Again, no objection was made. Defendant now argues that counsel was ineffective for failing to object to these matters. Because the witness' concern or fear might have affected his perception and memory, the testimony was relevant to the witness' credibility, possibly to defendant's strategic advantage. Defendant has failed to overcome the presumption of sound trial strategy, or shown that any alleged error affected the outcome of trial. *LaVearn, supra*.

Defendant correctly notes that the prosecutor asked him to comment on the credibility of three witnesses. These questions were improper and, absent some strategic reason, defense counsel erred in failing to object. See *People v Messenger*, 221 Mich App 171, 180; 561 NW2d 463 (1997). However, defendant has failed to show a reasonable likelihood that this error affected the outcome. *LaVearn, supra*.

Defendant also correctly notes that the trial court did not instruct the jury that a BB gun of less than .177 caliber is expressly excluded from the definition of "firearm." See MCL 8.3t and *Gee, supra*. However, no evidence was presented concerning the caliber of defendant's BB gun. Therefore, there was no factual basis for the instruction, and the court was not required to give it. *People v Mills*, 450 Mich 61, 80-81; 537 NW2d 909, modified 450 Mich 1212 (1995). Thus, the record does not demonstrate that counsel was deficient for failing to request this instruction.

As explained prior, the several statements defendant now claims were inadmissible hearsay were not offered for their truth, but rather to explain the witnesses' conduct after the robbery. Objections to those statements would have been futile and, therefore, counsel's failure to lodge objections did not constitute ineffective assistance. *People v Fike*, 228 Mich App 178, 182; 577 NW2d 903 (1998); *People v Chinn*, 141 Mich App 92, 98; 366 NW2d 83 (1985).

In sum, none of the alleged instances of ineffective assistance of counsel raised by defendant provide a basis for reversal.

Affirmed.

/s/ Brian K. Zahra
/s/ Mark J. Cavanagh
/s/ Helene N. White